Comments of the Czech Republic on the International Law Commission's draft guidelines on the topic „Provisional application of treaties"

With reference to paragraph 88 of the Report on the work of the seventieth session of the International Law Commission (doc. A/73/10), the Czech Republic welcomes the opportunity to present written comments on the set of draft guidelines, together with commentaries thereto, on the topic „Provisional application of treaties", adopted by the International Law Commission on first reading (2018).

The Czech Republic appreciates diligent effort and outstanding contribution of the Special Rapporteur, Mr. Manuel Gomez-Robledo, to the preparation of the draft Guide to Provisional Application of Treaties, and completion of the first reading of the draft Guide by the Commission.

We appreciate that several comments that we provided in the course of annual debates of the Sixth Committee of the General Assembly have been taken into account during the first reading of draft guidelines. At this stage we wish to make the following observations:

Meaning of the terms used in the draft Guide. The draft Guide does not contain a provision on definitions. The terms used throughout the draft Guide are supposed to be given the same meaning as the terms defined in article 2 of the 1969 Vienna Convention on the Law of Treaties and article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It might be useful to clarify this aspect, e.g. by including a short guideline on "Use of terms" stating simply that "the terms defined in articles 2 of Vienna Conventions of 1969 and 1986 are used in the present Guide in the meaning given to them in the mentioned provisions of the the two conventions." This would also make it clear that the draft Guide deals with the subject matter identical with that to which these provisions of Vienna Conventions apply.

Guideline 1 - Scope. We do not consider this draft guideline necessary. All elements it contains are contained also in draft guideline 2 on "Purpose". We note that the Guide to Practice on Reservations to Treaties does not contain analogous guideline.

Guideline 2 - Purpose. We agree with the key element of this guideline, namely that "The purpose of the present draft guidelines is to provide guidance regarding *the law and practice* on the provisional application of treaties". In view of the actual content of the draft Guide it is justified to spell out both elements. We wonder, however, whether the second part of the text, namely the reference to "article 25 of the Vienna Convention on the Law of Treaties" (as well as missing reference to article 25 of the 1986 Vienna Convention), should not be moved to the introductory part of the next draft guideline 3 (General rule). The mentioned provisions are indeed the key components of the "law of provisional application of treaties" and should therefore be highlighted in connection with the "General rule" – which in fact they constitute – rather than in connection with the "Purpose".

We agree with draft guidelines 3 (with the above suggestion), 4 and 5. We also agree with the draft guideline 6 (Legal effect of provisional application), as well as with draft guideline 8 (Responsibility for breach). In this respect we recall our position expressed earlier, namely that the provisional application of a treaty or some of its provisions is above all an "application" of the treaty. The obligations in question are real legal obligations, even if the

basis for their implementation is "provisional". The provisional application of a treaty is not just an option available for unilateral choice of States or a courtesy that the States simply reciprocate, but a firm legal obligation within the realm of principle "pacta sunt servanda". These obligations acquire their binding character at the latest in the moment when the provisional application is supposed to start. As a consequence, the breach of a treaty obligation in course of its provisional application is subject to rules governing international responsibility. Accordingly, also unilateral termination of provisional application, in violation of conditions for such termination, would amount to a breach of an international obligation which would entail international responsibility.

Guideline 7 - Reservations. As it was rightly underlined in connection with the elaboration of the Guide to Practice on Reservations, the regime of reservations is a single and uniform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation is formulated, and – in our view – also irrespective of whether such provision will or will not be applied provisionally. Reservations are usually formulated either before or at the time when also the consent to provisional application may be given, and without making distinction between the stage of "provisional application" and "application" of the treaty provision affected by the reservation. There is no reason to believe that the text of article 19 of the Vienna Convention concerning formulation of reservations was intended to not apply to reservations to provisions which may be applied provisionally.

This is however confused by the inclusion of words *"mutatis mutandis"* in paragraph 1 of the draft guideline 7. These words imply that relevant provisions of the Vienna Convention are not directly applicable to reservations to treaty provisions which may be provisionally applied. Even in the case when the reservation is formulated only for the period of the provisional application, there is no reason to assume that the provisions of the Vienna Convention concerning reservations do not apply directly, but "mutatis mutandis". The Latin phrase should be deleted.

Guideline 9 - Termination and suspension of provisional application. We agree with provisions of paragraphs 1 and 2, but we have some problems with the drafting of paragraph 3.

The reference to provisions of Part V, Section 3, of the Vienna Convention concerning „termination and suspension of the operation of treaties" brings some questions: The "without prejudice clause" in combination with the phrase "mutatis mutandis" makes it difficult to understand both the exact meaning and the purpose of this paragraph. Unlike the "termination of a treaty" which according to the above mentioned provisions of the Vienna Convention implies ending of a binding force of the treaty, the "termination of the provisional application" does not affect legal force of the treaty, but means only the ending of the provisional mode of its application. In other words, it seems that the term "termination" is not used in these two situations in a manner allowing an analogy. Similarly, we are not convinced that the "suspension of the provisional application" is necessarily an equivalent of the "suspension of the operation of the treaty or some of its provisions". Paragraph 3, as currently drafted, seems to raise more questions than it was intended to answer.

Finally, we agree with draft guidelines 10, 11 and 12.